No. 10727

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN R. HALEY, as Administrator of the Estate of George Salter, deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellant

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THURBER'S HELENA

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Counsel for Appellee in their brief question the sufficiency of our specifications of error to cover the rejection by the District Court of our proof of the allowance by the probate court of claims and administrative expenses.

There was no specific ruling upon this evidence, except as the judgment denied the sufficiency of all the evidence to make out a case for plaintiff.

We thought we had the point sufficiently covered, and argued it at length in our brief. We still think it is covered, especially by Specification No. 9.

However, in case the Court should deem it material, we ask to add a specification, No. 4½, to read as follows:

> "4½. The District Court erred in holding plaintiff's proof of claims and administration expenses insufficient and in rejecting such proof."

REPLY TO APPELLEE'S ARGUMENT

Appellee seems to have abandoned the theory urged by it in the trial court that the government is exempt from the payment of this insurance under the provisions of Sections 454a and 514, Title 38, U. S. C., as we find no reference to it in counsel's brief.

We gather from counsel's brief that the following propositions are urged:

I.

That the trial court must pass upon creditor's claims and administration expenses in the first instance,—in other words, take over the functions of the state probate court.

II.

That in some way, not clear to us, the Montana Uniform Declaratory Judgments Act of 1935 has some bearing upon this case.

III.

That the allowance of attorneys' fees by the probate court covers the same services which are being rendered in this suit, for which a fee is asked, and is violative of the penal provisions of Section 551, Title 38, U. S. C.

We will discuss these points in the order stated.

I.
CREDITORS CLAIMS, ETC.

This proposition is fully covered in our original brief, and we stand upon the argument and the citation of authorities contained in that brief.

Counsel question the service of notice upon the United States Attorney of the hearing of the matter of attorneys' and administrator's fees in the probate court.

We agree with Judge Bourquin when he said that the government is not required to appear in the probate court. Any issue of which the Federal Court has jurisdiction must be tried in the Federal Court.

This means that the Federal Court is not empowered to take part in the probate proceedings. Under the provisions of Section 514, Title 38, U. S. C., the money is to be paid to the estate of the deceased soldier, and become assets of his estate as of the instant of his death, "to be distributed as his general estate is distributed," which includes the determination and payment of debts and expenses of administration.

Brown vs. U. S.,
65 Fed. (2nd) 65.

This suit was brought and has been prosecuted in strict conformity with the provisions of Section 445, Title 38, U. S. C., and other applicable Federal statutes; and the probate of the estate has been conducted in strict accordance with the state laws governing the probate of the estates of intestates; and under the statutes and authorities cited in our original brief the insurance is payable to appellant to the extent of the legal claims and expenses of administration as determined by the probate court.

II.
UNIFORM DECLARATORY JUDGMENTS ACT

We cannot see any connection between the Uniform Declaratory Judgments Act and the estate of George Salter. No action under that statute has ever been brought by anyone interested in the Salter estate, and moreover the Montana Declaratory Judgments Act was passed by the Montana legislature on February 13th, 1935, more than four years after the first appointment of an administrator of the Salter estate, on August 11, 1930 (R. 12), and more than two years after the allowance of the creditors' claims in 1932 (R. 37, 39).

Chapter 16, Laws of 24th Session, 1935.

What questions might have arisen had the Uniform Declaratory Judgments Act been in force and had a proceeding under that Act been initiated are purely academic so far as the instant case is concerned.

III.
ATTORNEYS' FEES, ETC.

Counsel for appellee attempt to bring the fees of the attorneys as allowed by the probate court under the provisions of Section 551, Title 38, U. S. C., which limits fees for the presentation and adjudication of claims under the insurance contract to $10.00.

This provision has no reference to claims in suit, either before or after payment. The concluding portion of Section 551 provides for an attorney's fee, in case of suit, which shall not be more than 10% of the amount recovered.

The fees allowed and paid for the administration of the estate after the insurance has been paid to the estate

are for the determination of the probate court, and are not limited or affected by the $10.00 limitation. If the attorney's fees were so limited, so those of the administrator would also be limited; but neither is affected in any way by that limitation.

These questions have been raised for the first time on this appeal, so that there has been no previous occasion to notice them.

The probate court held hearings, and made its findings as the result of those hearings (R. 42 et seq.). It is to be noted that it trimmed down the creditors' claims over $2275.00.

The allowance of attorneys' fees was made under the authority of Section 10,285, Montana Rev. Codes of 1935, and are a claim against the estate.

McLure's Estate,
68 Mont. 556, 569,
220 Pac. 527.

The order allowing the attorneys' fees is based upon the value of the services shown at the hearing to have been rendered to the estate.

Had the $10.00 limitation been applicable to the fees in the estate the point would certainly have been raised in this Court in Brown vs. U. S., 65 Fed. (2nd) 65, or by the Supreme Court in Singleton vs. Cheek, 284 U. S. 493, 76 L. ed. (U. S.) 419, or Pagel vs. Pagel, 291 U. S. 473, 78 L. ed. (U. S.) 921.

In the Brown case there was practically no other property than the insurance, and in the Pagel case the claims and costs amounted to about $3800.00, with but little

other property than the insurance, and no mention is made of this point.

The $10.00 provision of Section 551 applies alike to insurance and compensation claims. There are thousands of estates of veterans under guardianship to which both compensation and insurance are being regularly paid, and in which the Veterans Administration scrutinizes the accounts of guardians, and regularly approves the periodical allowance of attorneys' fees and guardians' fees far in excess of the $10.00 limitation. This of course does not change the meaning of the law, but is conclusive evidence that the Veterans Administration does not consider that it applies to the administration of money after claim allowed and payment made.

While the point has not been mentioned by counsel for appellee, we call the Court's attention to the fact that the allowance of $500.00 to the administrators is apparently somewhat in excess of the power of the probate court under the provisions of Section 10287 of the Revised Codes of Montana of 1935.

That Section allows administrators 7% of the first $1000, and 5% of the next $9000 of the value of the property handled by the administrator, and permits the allowance of additional compensation for extraordinary services, but provides that "the total amount of such extra allowance must not exceed the total amount of commission allowed by this section."

This provision seems to be jurisdictional so far as extra allowances are concerned, and applying the practice followed by this Court in the Brown case, the Court would

undoubtedly be justified in cutting down the administrator's fees so that they would not be more than the probate court could allow under this section.

It was deemed necessary that these fees and those of the attorney should be fixed in advance of judgment in this case. At the time they were fixed the plaintiff was claiming the full amount of the insurance, or $10,000.00, and it is evident that this amount was taken into consideration by the probate court.

After the order fixing fees was made, however, the absence of heirs having been developed, the plaintiff filed his amended complaint for the sum of $4004.59, but the fact that this reduction in the amount sued for would affect the administrators' fees was not noted, and has not been mentioned by counsel for appellee, either in their brief here or in the Court below.

Interest is allowed on approved claims as upon judgments (Sec. 10,174 Mont. Rev. Codes, 1935). Judgments draw 6% interest until paid (Sec. 7729, Mont. Rev. Codes 1935).

The creditors' claims allowed amount to $1748.00, upon which there has now accrued over $1200.00 of interest. Attorneys' fees and costs totalling $908.81 were allowed, to which must be added the legal allowance to the administrators. These amounts now total more than $4000.00. Taking that figure as a basis, the statutory allowance to the administrator would be $220.00, which the probate court had the power to double, making $440.00. This would make the allowance of $500.00 to the administrators slightly more than the court is permitted to allow under the statute.

However, when all the accrued interest on the claims and the allowance to the administrators is taken into account the amount accounted for by the administrators would warrant an allowance nearly as great as the amount shown in the order of allowance (R. 47).

We mention these matters here somewhat in detail as they will become pertinent in the event this Court reverses the judgment.

IN GENERAL

While we have not tried to answer separately the suggestions made here and there throughout Appellee's brief, they all fall under some of the three classifications above.

The two theories of this case seem to be as follows:

Appellant contends, consistently with the ruling of this Court, that the probate of the estate is within the exclusive jurisdiction of the state district court.

The Appellee, however, contends that the probate of the estate must be had in the Federal Court, and that all matters arising in the estate are to be passed upon originally by the Federal Court, which would necessarily mean that any judgment would run in favor of the individual claimants; notwithstanding the statute (Sec. 514, Title 38, U. S. C.) requires that the money be paid to "*the estate*", and stops there.

Every matter involved in this appeal, with the exceptions herein noted, has been fully covered by our opening brief, and we are standing upon the argument and citation of authorities contained in that brief.

While we confess that we do not understand that the informal conclusion at the end of appellant's brief is to be considered as a pleading, yet, taking note of Appellee's criticism, and in case it should make any difference to anyone, we revise the prayer in our original brief and ask that the judgment of the District Court be set aside and judgment as prayed for in the complaint be entered, with modifications as suggested herein, or in the alternative that the judgment be set aside and plaintiff granted a new trial.

Respectfully,

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Attorneys for Appellant.